

U.S. Department of Labor

Office of Administrative Law Judges  
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In the Matter of

ROSEMARIE RUSSO,  
COMPLAINANT

DATE ISSUED: January 12, 2001  
CASE NUMBER: 2001-CAA-0001

v.

U.S. ENVIRONMENTAL  
PROTECTION AGENCY,  
RESPONDENT

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BEFORE: Thomas M. Burke  
Associate Chief Administrative Law Judge

**RECOMMENDED ORDER APPROVING SETTLEMENT**

This matter arises under the employee protection ("whistleblower") provision of the Clean Air Act ("CAA"), 42 U.S.C.A. § 7622 (2000). On December 12, 2000, the parties submitted to the undersigned a Joint Motion to Approve Settlement and Dismiss Complaint, to which they attached a Settlement Agreement. The CAA requires that the Secretary must enter into or otherwise approve the settlement of a whistleblower complaint. *See* 42 U.S.C.A. §7622(b)(2)(A). The Secretary's participation is effected by the adjudicator's order finding that the settlement is fair, adequate and reasonable. *See McDowell v. Doyon Drilling Services, Ltd.*, 1996-TSC-8 (ARB May 19, 1997).

Review of the agreement reveals that it encompasses the settlement of matters under laws other than the CAA. *See* ¶4.b.. As stated in *Poulos v. Ambassador Fuel Oil Co., Inc.*, 1986-CAA-1 (Sec'y Nov. 2, 1987), slip op. at 2:

[The Secretary's] authority over settlement agreements is limited to such statutes as are within [the Secretary's] jurisdiction and is defined by the applicable statute. *See Aurich v. Consolidated Edison Company of New York, Inc.*, Case No. [86-]CAA-2, Secretary's Order Approving Settlement, issued July 29, 1987; *Chase v. Buncombe County, N.C.*, Case No. 85-SWD-4, Secretary's Order on Remand, issued November 3, 1986.

I have therefore limited my review of the agreement to determining whether the terms thereof are a fair, adequate and reasonable settlement of Complainant's allegations that Respondent violated the CAA.

I interpret the confidentiality provision in ¶ 5 of the Settlement Agreement requiring Complainant not to disclose or discuss the terms or substance as the settlement agreement except with her attorney, immediate family members, her financial advisor, or EPA officials responsible for implementing the terms of the agreement, as not restricting any disclosure where required by law. *See Bragg v. Houston Lighting & Power Co.*, 1994-ERA-38 (Sec'y June 19, 1995).

Paragraph 7 of the agreement states that the parties may petition the Administrative Review Board ("ARB") for enforcement of its terms and provisions. The parties are notified, however, that it is probable that the ARB does not have the authority, even with the consent of the parties, to enforce a settlement agreement resolving a retaliation claim brought by an employee/whistleblower against his employer under the CAA. *See Williams v. Metzler*, 132 F.3d 937, 941-43 (3rd Cir. Dec. 30, 1997) (case below, ARB No. 96-160, ALJ No. 1994-ERA-2) (interpreting the enforcement provision of the ERA, 42 U.S.C.A. § 5851(d), which is identical to the enforcement section of the CAA. 42 U.S.C.A. § 7622(d)).

In the motion to approve the settlement, the parties request that the settlement agreement remain confidential consistent with the Freedom of Information Act and the Privacy Act. The parties should note that the ARB has repeatedly held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C.A. §552, "requires agencies to disclose requested documents unless they are exempt from disclosure. . . ." *Coffman v. Alyeska Pipeline Services Co. and Arctic Slope Inspection Services*, ARB Case No. 96-141; ALJ Case Nos. 1996-TSC-5 and 6 (ARB June 24, 1996), slip op. at 2-3. The ARB and the Secretary of Labor have held that records in whistleblower cases "are agency records which the agency must make available for public inspection and copying under the FOIA. In the event a member of the public requests the opportunity to inspect and copy the record of this case, the Department of Labor must respond to that request as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed." *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB Mar. 27, 1997); *Corder v. Bechtel Energy Corp.*, 1988-ERA-9 (Sec'y Feb. 9, 1994).

I find that the agreement, as so construed, is a fair, adequate, and reasonable settlement of the complaint. Accordingly, I recommend **APPROVAL** the agreement and **DISMISSAL OF THE COMPLAINT WITH PREJUDICE**. *See* Agreement ¶4.a.

So **ORDERED**.

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THOMAS M. BURKE  
Associate Chief Administrative Law Judge

TMB/trs/lr

**NOTICE:** This Recommended Order Approving Settlement will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. § 24.8 (2000).